IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1927.

No. .....

ALLIE E. LEWIS AND WILLIAM LLOYD LEWIS,
Petitioners,
vs.
UNITED STATES OF AMERICA, *Defendant.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

I.

The Opinion of the Court Below.

The opinion in the United States Circuit Court of Appeals for the Eighth Circuit was rendered November 28, 1927, and is reported in 22 Fed. Rep. (2nd Ser.) 760. It is copied in the record on page 900. The opinion on rehearing was rendered May 7, 1928, but has not been officially reported at this time. It is copied in the record at page 983.

II.

Jurisdiction.

(1) *Date of judgment to be reviewed.*

The judgment of the District Court was rendered March 30, 1926 (R. 65). The judgment of the Circuit Court

of Appeals was rendered November 28, 1927 (R. 900). Petition for rehearing was filed in the Circuit Court of Appeals on January 24, 1928 (R. 913), and was denied on May 7, 1928 (R. 983).

(2) *Specific claims advanced and rulings made in lower court relied upon as a basis of this court's jurisdiction.*

The petitioners asserted in the District Court and the Circuit Court of Appeals that: *(a)* The court for the new Eastern District of Oklahoma did not have jurisdiction to indict petitioners for the offenses charged because: *(1)* the new Eastern District, and the court thereof, had not been created at the time the offenses are charged to have been committed; *(2)* because that court had no power or authority to summon and impanel grand jurors from all parts of the old Eastern District as it existed at the time the offenses were committed; *(3)* because the place where the offenses were committed was outside of, and beyond, the territorial limits of the new Eastern District at the time the indictment was returned. *(b)* That the court for the new Eastern District of Oklahoma had no jurisdiction to try the petitioners on the indictment returned because: *(1)* the new Eastern District, and the court thereof, had not been created at the time the offenses were committed; *(2)* because that court had no power or authority to summon or impanel petit jurors from all parts of the old Eastern District as it existed at the time the offenses were committed; *(3)* because the place where the offenses were committed was outside of, and beyond, the territorial limits of the new Eastern District at the time the indictment was re-

turned and at the time the trial was had. *(c)* That the making of false statements in the minute book of the bank was not a violation of section 5209 of the Revised Statutes prohibiting the making of false entries in any book of a national banking association, because the word "entry" as therein used means an "item of account" and the word "book" as therein used means a "book of account," and the first thirty-seven counts of the indictment are bad on demurrer. *(d)* That the wilfull misapplication of the funds of a national bank by an officer thereof which results in the making of false entries in reports to the comptroller of the currency by other employees of the bank without any direction to do so by the officer guilty of such misapplication, does not render such officer guilty of making such false entries, and that the evidence was wholly insufficient to sustain a conviction of the petitioners on any of the last three counts of the indictment.

(3) *Statutory provisions under which jurisdiction is invoked.*

"In any case, civil or criminal, in a Circuit Court of Appeals * * *, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require, by *certiorari*, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." (28 U. S. C. A., section 347.)

(4) *Reference to cases believed to sustain jurisdiction.*

—*United States* v. *Gulf Refining Company*, 268 U. S. 542, 69 L. ed. 1082;

Section 347, 28 U. S. C. A.

Statement of the Case.

A concise statement of the case has been fully covered in the petition for writ of *certiorari* under the heading, "Summary of the Matter Involved," and in the interest of brevity, the statement is not repeated at this point.

Specifications of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the District Court for the new Eastern District of Oklahoma had jurisdiction to indict the petitioners for the offenses charged in the indictment.

2. The Circuit Court of Appeals erred in finding and holding that the District Court for the new Eastern District of Oklahoma had jurisdiction to try the petitioners on the indictment returned.

3. The Circuit Court of Appeals erred in finding and holding that false statements in the minute book of the bank that directors' meetings were held and reports of discount committees made and approved and expense accounts were examined and approved, constitute "entries" within the meaning of that word as used in section 5209 of the Revised Statutes, and that the "minute" book was a "book" of the bank within the meaning of said statute, and erred

in not holding that the word "entry" as used in said statute means an "item of account" and that the word "book" as used therein means a "book of account," and erred in finding and holding the first thirty-seven counts of the indictment good as against demurrer.

4. The Circuit Court of Appeals erred in finding and holding that the wilfull misapplication of the funds of a national bank by an officer thereof which resulted in the making of false entries in reports to the comptroller of the currency by other employees of the bank without any direction to do so from the officer guilty of such misapplication, renders such officer guilty of making such false entries, and erred in finding and holding that the evidence under the last three counts of the indictment was sufficient to sustain a conviction thereon.

5. The Circuit Court of Appeals erred in finding and holding that the petitioners could be legally and lawfully indicted and tried in a court that did not have the power and authority to summon grand or petit jurors from every part of the district as it existed at the time the offenses were committed.

ARGUMENT.

Summary of the Argument.

Point A. The court for the new Eastern District of Oklahoma, where the petitioners were indicted and tried, did not have jurisdiction to indict or try them and the opin-

ion of the Circuit Court of Appeals in sustaining such conviction is contrary to, and in conflict with, prior federal decisions.

Point B. The first thirty-seven counts of the indictment fail to charge any offenses against the petitioners because the false entries charged are not items of account or made in a book of account of the bank.

Point C. The evidence is wholly insufficient to sustain a conviction of the petitioners under the last three counts of the indictment.

Point A.

The court for the new Eastern District of Oklahoma, where the petitioners were indicted and tried, did not have jurisdiction to indict or try them and the opinion of the Circuit Court of Appeals in sustaining such conviction is contrary to, and in conflict with, prior federal decisions.

The jurisdiction of the District Court for the new Eastern District of Oklahoma turns upon a construction of the Sixth Amendment to the United States Constitution, sections 24 and 59 of the Judicial Code and the provisions of the Act of Congress of February 16, 1925, amending section 101 of the Judicial Code relating to Federal District Courts and court districts in Oklahoma.

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and *district* wherein the crime

shall have been committed, which district shall have been previously ascertained by law."

Section 59 of the Judicial Code provides:

> "Whenever any new district or division has been, or shall be, established or any county or territory has been, or shall be, transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county or territory prior to such transfer shall be commenced and proceeded with the same as if such new district or division had not been created or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial."

Section 24 of the Judicial Code, so far as applicable, provides:

> "The District Court shall have original jurisdiction as follows: * * * *second*, of all crimes and offenses cognizable under the authority of the United States."

The Act of Congress of February 16, 1925, is not copied herein in full because of its length, but it is shown in the appendix under the heading "A."

It is uncontroverted that the petitioners were indicted in the *court* of the *new* Eastern District of Oklahoma by a grand jury drawn and impaneled exclusively from the territory now embraced in the new Eastern District and they were tried and convicted in the *court* of the *new* Eastern District before a petit jury drawn and impaneled exclusively from the territory now embraced within the new Eastern

District. They were not indicted or tried in the court of the old Eastern District or in the court of the Northern District. They were indicted and tried in a court that did not have jurisdiction over the place where the offenses were committed. If the Act of February 16, 1925, and section 59 of the Judicial Code preserved the old Eastern District and reserved jurisdiction in the court thereof for the indictment and trial of offenses committed before the passage of the act, then the court of the old Eastern District had jurisdiction and not the court of the new Eastern District. If the old district was not preserved and jurisdiction of its court reserved, then the court of the Northern District had jurisdiction in this case.

The new Eastern District does not have the same identity as the old Eastern District and the two are not the same in fact. The identity of a judicial district is determined solely and alone by its territorial boundary and one judicial district differs from any other judicial district solely in its territorial confines. There can be no other difference between different judicial districts. The new Eastern District has within its territorial boundary thirty counties. The old Eastern District, forty counties. The fact that the two districts have thirty counties in common cannot, in the very nature of things, make them the same district or give them the same identity, especially is this true when they are considered in reference to jurisdiction over an offense committed within a county which is within the territorial boundary of one district and without the territorial boundary of the other. The fact that the new Eastern District and the old Eastern District are both referred

to and designated in the Act of February 16, 1925, as the "Eastern" District has given rise to some confusion, although the language of the act itself very plainly shows that Congress had in mind the separate identity of the two districts and their courts and specifically preserved said identity in the act itself. That act, after creating under section 1 the new Northern, Eastern and Western Districts of Oklahoma, defining the territorial limits of each district and fixing the regular terms and places for holding court in each district, proceeds in sections 2 and 5 to provide as follows:

> *Section 2.* "The present Senior Judge of the Eastern District of Oklahoma be, and he is hereby assigned to hold said court in said Eastern District and shall exercise the same jurisdiction and perform the same duties within *said* district as he exercised and performed within *his* district prior to the passage of this act. That the present judge of the Western District of Oklahoma be, and he is hereby assigned to hold said court in the Western District of Oklahoma and shall exercise the same jurisdiction and perform the same duties in *said* district as he exercised and performed within *his* district prior to the passage of this act. That the present Junior Judge of the Eastern District of Oklahoma be, and he is hereby, assigned to hold said court in the Northern District and shall exercise the same jurisdiction and perform the same duties within *said* district as he exercised and performed within *his* district prior to the passage of this act. Each of said judges and courts shall in all other respects have all the power and authority, civil, criminal, equitable or otherwise, which is conferred by law generally upon the District Courts of the United States and the judges thereof."

district, fixed the times and places for holding the regular terms of court of each district and the places where the clerks of the courts should keep their offices and fixed and prescribed the jurisdiction and authority of each court and judge thereof, the act then proceeds in section 5 to deal with the jurisdiction and authority of the old courts and their officers and provides that the jurisdiction and authority of the courts and officers of the old Eastern District as theretofore divided between them by an order of the Senior Judge of the Circuit Court of Appeals for the Eighth Circuit should continue over the territory embraced within the Northern District as theretofore until the organization of the court for the Northern District, but thereupon, should cease and determine, save and except as to the authority expressly conferred by law in said courts, judges or officers or any of them, to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of the said Northern District. The jurisdiction and authority of the old courts and their officers in all other respects had been terminated and destroyed by the creation of the new districts and the new courts thereof. As to past offenses, the old courts and the old districts were preserved by section 5 of the act, with the same powers and jurisdiction and with the same territorial boundaries as existed before the act was passed. The preservation of the old districts and the reservation of the jurisdiction of the old courts has always been regarded as necessary in view of the Sixth Amendment, to the legal prosecution of offenses committed prior to the change. Before section 59 of the Judicial Code was

adopted, each act changing the courts and districts contained a provision preserving the old districts and the jurisdiction of the old courts as to past offenses, and it was to avoid the necessity of incorporating such a provision in each act that Congress enacted section 59 of the Code.

The court for the new Eastern District is not the same court as that of the old Eastern District. The court for the new Eastern District has but one judge and no divisions and may sit at places and times in regular term where and when the court for the old Eastern District may not sit. The court for the old Eastern District has two judges, two divisions and may sit at places and at times in regular term where and when the court for the new Eastern District cannot sit. The court for the new Eastern District exercises jurisdiction over thirty counties and continues into the future from the date of its creation until destroyed by subsequent legislation. The court for the old Eastern District exercises jurisdiction over forty counties and does not continue into the future as theretofore for any purpose save and except over the territory embraced in the ten counties now in the Northern District for all purposes until the organization of the court for the Northern District and thereafter, only for the purpose of commencing and proceeding with the prosecution of offenses committed prior to the taking effect of the Act of February 16, 1925, and that limited and restricted jurisdiction will cease and terminate when all necessity for its existence in commencing and proceeding with the prosecution of crimes and offenses committed prior to the taking effect of the Act of February

16, 1925, has passed. It may sit and exercise jurisdiction over ten counties over which the court for the new Eastern District has no jurisdiction. It would seem that this question of the identity of the districts and the identity of the courts thereof is not open to controversy. It is so plain that it must necessarily force conviction to the minds of all that the districts are not the same and that the courts are separate and distinct tribunals.

There is shown in the Appendix under "C" insert maps showing in colors the old Eastern and Western Districts of Oklahoma and the court towns therein, and the Northern, Eastern and Western Districts of Oklahoma and the court towns therein under the Act of February 16, 1925, and also the new districts super-imposed upon the old districts. These maps will give the court a clear understanding of the change made by the Act of February 16, 1925.

The word "court" as a mental conception, has been defined by this court in the case of *Todd* v. *United States*, 158 U. S. 278, 39 L. ed. 982, as follows:

> "A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law."

For other authorities on the meaning of "court," see, *In re Steele*, 156 Fed. 853; *United States* v. *Clark*, 25 Fed. Cases 441, case No. 14804; *In re Terrell*, 52 Kan. 29, 39 Am. St. Rep. 327; *State* v. *LaBlonde*, (Ohio) 140 N. E. 510; *Belford* v. *State*, (Ark.) 131 S. W. 953.

It has been held that even in cases where territory has been transferred from one previously existing district to another previously existing district, the identity of the old district and the identity of the old district court must be preserved in order to commence and proceed with the prosecution of crimes and offenses committed before the change. *United States* v. *Hackett*, 29 Fed. 848; *United States* v. *Benson*, 31 Fed. 896.

Prior to August 5, 1886, the State of California constituted one judicial district known as the District of California. On the above date, Congress divided California into two districts, one known as the Southern District of California and the other known as the Northern District of California. The act provided that:

> "All offenses heretofore committed in the District of California, shall be prosecuted, tried and determined in the same manner and to all intents and purposes as if this act had not been passed."

After the Act of Congress took effect, the Government continued to indict and prosecute offenders in the court for the District of California for offenses committed prior to the 5th day of August, 1886. Offenses committed after August 5, 1886, were prosecuted in the court for the Southern District of California, or the court for the Northern District of California, depending upon the district in which the offense was committed, but as to offenses committed prior to August 5, 1886, the court for the old District of California was treated as if in existence and prosecutions had therein, summoning grand and petit juries from the entire territorial body of the old District of California.

In *United States* v. *Hackett*, 29 Fed. 848, the defendant was indicted in the court for the old District of California by a grand jury of that district for an offense committed prior to the 5th day of August, 1886, and the defendant was being prosecuted on said indictment in the court of the old District of California. The court, in that case, speaking through Judge HOFFMAN, held that the old District of California and the court thereof continued to exist after the redistricting act was passed and that offenses committed prior thereto could be prosecuted in the court for the old district, saying:

> "For the purpose of trying offenders who had been indicted or whose offenses had been committed before the passage of the act, it was necessary to keep alive the District Court of the District of California (the same observation applies to the Circuit Court) in order that a court might be organized and be in existence competent to call a jury from the body of the district where the crime was committed."

And,

> "Inasmuch as every offender has a right to be tried by a jury of the district in which the crime was committed, which district shall previously have been ascertained by law, it is plain that a jury of the Northern District could not try an offender who has committed a crime while the district comprised the whole state; neither could a jury of the Southern District try him."

And,

> "The result is that the District Court for the District of California and the Circuit Court for the District may continue to sit and summon jurors from the whole district for the purpose of trying those offend-

ers. We are, therefore, of the opinion that the course adopted, though anomalous and open to some inconvenience, is the only course to be adopted unless we are willing to say that all indictments pending in either court and all offenses committed before the passage of the act, must, the one be discontinued and fail for want of jurisdiction and the other fail because the act secures the impunity of offenders."

In *United States* v. *Benson*, 31 Fed. 896, the same doctrine is laid down in an opinion by Circuit Judge FIELD concurred in by Circuit Judge SAWYER and District Judge HOFFMAN. These two cases are cited and approved by the Circuit Court of Appeals of the Eighth Circuit in *Lewis* v. *United States*, 14 Fed. (2nd Series) 369. The last case is not a former appeal of this case, but was a prosecution of the petitioners for wilfull misapplication of the funds of the Liberty National Bank on an indictment found and returned in the court of the old Eastern District before the Act of February 16, 1925, was passed, and which was pending in that court when the act was approved.

There is no case to be found in the authorities holding that a prosecution can be commenced or proceeded with in the court of a district as it existed after a county in which the offense was committed has been transferred to another district. The only case that even tends in that direction is *United States* v. *Peuschel*, 116 Fed. 642, but an examination of that case discloses that three counties were detached from the Northern District of California, which was a previously existing district, and attached to the Southern District of California, which was also a previ-

ously existing district. *The offense in that case was not committed in the transferred territory* but was committed in the counties of Kern and Tulare, which were a part of the Southern District of California both before and after the transfer of the counties of Inyo, Mariposa and Merced from the Northern District to the Southern District of California. The prosecution in that case was in the court for the Southern District of California and that court had power and jurisdiction to summon jurors from the uttermost limits of the Southern District of California as it existed at the time the offense was committed and the court held that its jurisdiction to try the defendant for an offense committed in Kern and Tulare counties was not affected by the fact that thereafter the counties of Inyo, Mariposa and Merced were transferred to the Southern District from the Northern District.

The court said in the *Peuschel* case:

> "The fact that said provision was not so extended shows conclusively that in the opinion of Congress, the transfer of the three counties from one district to the other could not affect prosecutions for offenses theretofore committed, *except such as were committed in the transferred counties.*"

There is a very marked distinction between a case where the offense was committed in transferred territory and a case where the offense was committed in territory not transferred and there is also a marked distinction between a case where the prosecution is in the court of the district to which the transferred territory has been added and a case where the prosecution is in the court of a dis-

trict from which the transferred territory has been taken. To illustrate, we will draw the distinction with reference to the facts in the *Peuschel* case. There the offense was committed in a county not transferred, but which was in the Southern District of California both before and after the Act of May 29, 1900, was passed. The Southern District of California, after the act was passed, contained all the territory of the old Southern District plus three counties transferred to it from the old Northern District. The court of the Southern District, therefore, after the passage of the act, had jurisdiction over all of the territory in the old Southern District and could summon both grand and petit jurors from any and every part of the territory of the old Southern District. If the offense had been committed in one of the transferred counties, the court of the new Southern District would not have had power or jurisdiction to summon jurors from every part of the district in which the county was situated at the time the offense was committed, nor would the court for the new Northern District of California have jurisdiction to summon jurors from every part of the old Northern District, because three of the counties, including the one in which the offense was committed, would then be outside of the territorial jurisdiction of the court for the new Northern District. It would have been necessary, then, as provided in the Act of May 29, 1900, to preserve the old Northern District and the court thereof for the trial of offenses committed in the transferred territory prior to the change because that would be the only way in which there could be preserved a court organized and with power and jurisdiction to summon

jurors from every part of the old Northern District, and as said in the *Peuschel* case, under such circumstances, prosecutions for offenses committed prior to the change would be affected. They would be controlled by the provision of the act reserving jurisdiction in the court of the old Northern District, and that court would have jurisdiction, if it determined to do so, to summon jurors from any county in the old Northern District.

In the instant case, the offense was committed in Tulsa County, which is within the jurisdiction of the court of the old Eastern District and not within the jurisdiction of the court of the new Eastern District, but is now within the jurisdiction of the court of the Northern District, and jurisdiction to indict and try the petitioners for the offenses charged would inhere in the court of the old Eastern District and the court for the new Eastern District would have no jurisdiction to commence or proceed with the prosecution of the petitioners.

The statements of the Circuit Court of Appeals in the instant case are misleading unless they are considered in the light of the facts to which they are applied. The court held in following the decision of *Lewis* v. *United States*, 14 Fed. (2d) 369, that the original Eastern and Western Districts of Oklahoma were continued for trial and punishment of crimes committed prior to the enactment of the statute creating three new districts in Oklahoma and affirmed the conviction of petitioners, although they were not indicted or tried in the court of the old Eastern District, which was continued for that purpose. It is shown by

the record, and admitted by the Government and the Circuit Court of Appeals in the instant case, that the petitioners were indicted and tried in the court of the newly created Eastern District and the only explanation of this made by the Circuit Court of Appeals in its opinion, is:

> "A practical interpretation of the Act of Congress contemplated the continuance of the Eastern District of Oklahoma, not as a stranger to the former district, but with new boundaries after the analogy of the transfer of a county or counties from districts in other cases."

The Circuit Court of Appeals held that section 59 of the Judicial Code has express application to this case in that it provides for a trial in the district from which counties have been transferred in the same manner as if such counties had not been transferred, etc., unless upon application of the petitioners, the court should order the cause to be removed to the new district for trial, and yet it affirmed the conviction of the petitioners in the face of the fact that the record shows that they were not tried in the district from which counties had been transferred in the same manner as if the act had not been passed, but were tried in the court of a district created several months after the offenses are alleged to have been committed and whose territorial limits never included the County of Tulsa, in which the offenses were committed. The lower court does not discuss the question of the indictment of petitioners, but considers the case from the standpoint of the trial of the petitioners, although the record shows that petitioners

properly raised the question of the court's jurisdiction to indict, from the very inception of the case.

The Circuit Court of Appeals and the District Court in this case have sustained the conviction of the petitioners on the theory that the court of the new Eastern District is the same court as the court of the old Eastern District, and that the new Eastern District is the same as the old Eastern District though they are admittedly separate and distinct districts and tribunals.

Section 2 of article 3 of the Constitution of the United States provides:

> "The trial of all crimes, except in cases of impeachment, shall be by a jury; and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Under this provision, the only restriction as to the place of trial when committed in a state was that the trial should be held within the state. This was not a sufficient protection to the citizen, according to the view of many of the framers of the constitution, nor a sufficient designation of the vicinage from which juries should be drawn to indict and try citizens for crimes committed. It was contended that after a crime was committed, Congress might, for political, or other reasons, change or alter federal judicial districts and thus restrict or extend the vicinage from which grand and petit juries might be drawn for the trial of such offenses and thus endanger the cherished right of

trial by jury, at the place where the crime was committed and before a jury of the immediate vicinage. So, shortly after the adoption of the Constitution, the Sixth Amendment was submitted and adopted. It provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The language, "which district shall have been previously ascertained by law" means that the district must have been ascertained by law prior to the commission of the offense. *United States* v. *Maxon*, 5 Blatchford 360, 26 Fed. Cases 1220, case No. 15748; *United States* v. *Dawson*, 15 Howard 468, 14 L. ed. 775; *Cook* v. *United States*, 138 U. S. 157, 34 L. ed. 906.

The Circuit Court for the Eastern District of New York in the *Maxon* case, said:

> "The argument in support of the jurisdiction is, that if the district is ascertained by law before the trial, the amendment is sufficiently complied with. We think that this interpretation is not in accordance with the fair import of the terms of the provision; nor would it meet the grievance it was intended to remedy, namely, the formation of a district after the offense was committed, to suit the will or caprice of the law-making power. According to the very words of the amendment, there must be a speedy trial by an impartial jury of the state and district in which the crime was committed, which district (the one in which it was committed), shall have been previously ascertained by law, that is, *previous to the commission of the offense.*"

The decision in that case came on a motion to quash an indictment against John Maxon for grand larceny alleged to have been committed on the 31st day of December, 1883, in the Navy Yards at Brooklyn, New York. At that time, the Navy Yards were in the Southern District of New York. By an Act of February 25, 1885 (13 Statutes 468), the Eastern District of New York was established and such Navy Yard fell within its territorial limits and jurisdiction. The indictment was subsequently found in the District Court for the Eastern District and was transmitted to the Circuit Court for the Eastern District. The Circuit Court sustained the motion to quash and dismissed the indictment.

This court, in *Cook* v. *United States, supra*, had under consideration the effect of the provisions of the Sixth Amendment to the Constitution on the question of venue, where the offense was committed in a territory of the United States, but not within the limits of any state and this court in that case said:

> "In respect to that clause of the Sixth Amendment declaring that the district shall have been previously ascertained by law, it need only be said that if those words import immunity from prosecution where the district is not ascertained by law before the commission of the offense, or that the accused can only be tried in the district in which the offense was committed (the district having been established when the offense was committed), the amendment has reference only to offenses against the United States committed within a state. *United States* v. *Dawson*, 56 U. S., 15 Howard 467, 487, 488 (14:775,783); *Jones* v. *United*

States, 137 U. S. 202, 211, 212 (34:691,695). The second section of Art. 3 has provided, in respect to crimes committed in the states, that the trial by a jury should be had within the state where the crime was committed. The Sixth Amendment added the further guarantee in respect to the place of trial, that the district should have been previously ascertained by law, leaving the trial of offenses not committed within any state to be controlled by the second section of article 3."

This court also said in the *Cook* case, *supra*, in quoting from *United States* v. *Jackalow*, 56 U. S. 485, 17 L. ed. 225:

> "So, in *United States* v. *Jackalow*, 66 U. S., 1 Black 484, 486 (17: 225, 226), 'the crimes committed against the laws of the United States out of the limits of a state are not local, but may be tried at such place as Congress shall designate by law; but are local if committed within the state. They must then be tried in the district in which the offense was committed'."

In *United States* v. *Greene*, 146 Fed. 776, the United States District Court for the Eastern Division of the Southern District of Georgia, in construing the Sixth Amendment, said:

> "The term, 'previously ascertained by law,' necessarily imports previously to the commission of the crime, or at least to the accusation. Now, it will not be disputed that the offense charged against the prisoners, if offense it be, was committed before the creation of the Southwestern Division of the Southern District of Georgia, with provision for court at Valdosta. At that time, the Eastern Division of the district comprehended the counties from which the grand jurors who found the indictments under consideration were drawn. The district, as it then stood was, therefore,

the district as it had been previously ascertained by law. It follows that since a large number of counties have been, subsequently to the alleged commission of the offense, withdrawn from the Eastern District and comprehended in the Southwestern Division, the Eastern Division now at this time is not as it had been previously ascertained by law. It follows that this principle of our organic law, which is over and above all other laws, obliges the court to try the defendants in the district as it stood at the time the offense is alleged to have been committed. The obvious intention of the framers of the constitution was to create a vicinage for the court from which jurors must be drawn. The vicinage was the late Eastern Division of the Southern District of Georgia, but that vicinage had been impaired as we have seen, by an Act of Congress. Acts of Congress cannot impair the constitution or its effect. It follows, therefore, that as to these prisoners, the vicinage in which they are to be tried is the Eastern Division of the Southern District of Georgia, as it had been previously ascertained at the time the offense is alleged to have been committed."

In *United States* v. *Dawson*, *supra*, the defendant was indicted in the Circuit Court of the United States for the District of Arkansas for the murder of one Seaborn Hill, in the Indian country west of the State of Arkansas. After the offense was committed and after the indictment was returned, but before the trial thereof, the State of Arkansas was divided by Congress into two districts, known as the Eastern District and the Western District of Arkansas. The Western District included nine of the western counties of Arkansas and the Indian country lying west of the state. The rest of the State of Arkansas constituted the Eastern

District. The contention was made in that case that the United States Court for the Eastern District of Arkansas had no jurisdiction because the offense was not committed in the Eastern District of Arkansas, but was committed in what, at the time of the trial, was the Western District of Arkansas and at the time of the commission of the offense and the returning of the indictment was the District of Arkansas. There were two opinions in that case, a majority opinion by Justice NELSON and a dissenting opinion by Justice MCLEAN. The court in the majority opinion held that the Sixth Amendment to the Constitution did not apply because the offense was not committed *within the State of Arkansas*, but in the Indian country outside of the State of Arkansas and that the place of trial was ruled by section 2, article 3 of the Constitution, but in discussing the matter, the court said:

> "The argument is that since the erection of the new district out of the nine western counties in the state, together with the Indian country, it is not competent for the Circuit Court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offense is committed and the trial is to be had, must be ascertained and fixed previous to the commission of the offense. But it will be seen from the words of this amendment that it applies only to the case of offenses committed within the limits of a state; and whatever might be our conclusion, if this offense had been committed within the State of Arkansas, it is sufficient here to say, so far as it respects the objection, that the offense was committed out of its limits and within the Indian country."

Justice McLean in his dissenting opinion contends even when the offense was committed without the limits of the state, the indictment and trial must be had in the district as it existed at the time the offense was committed. He said:

> "As the state and district are connected by the copulative conjunction in this provision, the case before us is not technically within it. The crime is alleged to have been committed within the Indian country, which the district includes, but it is not within the state, but the case appears to me to be within the policy of the provision. Nine counties of the State of Arkansas are within the district and from which the jury to try the defendant might be summoned. This brings the case substantially within the above provision. *Had the place of the murder been within one of the above counties, the constitutional provision must have governed the case.*"

And,

> "If tried in the Eastern District, the jury must have been summoned from that district and not from the district in which the offense was committed. The considerations in favor of the Western District as the legal place of trial greatly outweigh, it seems to me, any that can arise in favor of the Eastern District."

In the case at bar, there are involved two questions of jurisdiction; *first*, jurisdiction to indict, and *second*, jurisdiction to try. The offenses are alleged to have been committed in Tulsa County in the State of Oklahoma. At the time of the commission, Tulsa County was in the second division of the old Eastern District. At the time the indictment was returned in the court for the new Eastern

District at Muskogee, Tulsa County was not within the territorial boundary of the new Eastern District, but was within the territorial boundary of the Northern District and the situation was the same at the time of the trial in the court of the new Eastern District.

Under these authorities, it seems most clear that the indictment in this case must be found, and the trial had, in the court of the old Eastern District by a grand jury and a petit jury of that district as it was constituted and existed at the time the offenses are alleged to have been committed. *This was not done.* The indictment was returned in the court for the *new Eastern District* at Muskogee on June 23, 1925, by a grand jury drawn and impaneled exclusively from the territorial limits of the new Eastern District and the trial was had at Ardmore, Oklahoma, in the court of the new Eastern District before a jury drawn and impaneled exclusively from the territorial limits of the new Eastern District.

It is conceded by the Government in this case that the court in which the indictment was returned and in which the trial was had, had no power or authority or jurisdiction to summon grand or petit jurors from the ten counties of the old Eastern District (including Tulsa County) which under the Act of February 16, 1925, are included in the Northern District, and the Circuit Court of Appeals for the Eighth Circuit in *Lewis* v. *United States*, 14 Federal (2nd Series) 369, said:

> "If jurors from the counties transferred from the Eastern to the Northern District were to be selected, it would necessitate a writ of *venire facias* to the marshal

> for the Northern District for the marshal of the Eastern District has no power to execute it outside of his own district. There is no statute authorizing jurors to be drawn for service out of the district of their residence."

See, also, *Hale* v. *United States*, 25 Fed. (2d) 430;

If petitioners had been indicted and tried in the court of the old Eastern District as required by the Sixth Amendment to the constitution, section 59 of the Judicial Code and the Act of Congress of February 16, 1925, the court would have had jurisdiction to summon both grand and petit jurors from the utmost limits of the old Eastern District, including the ten counties referred to, and the marshal of the old Eastern District would have had power and authority to summon these jurors from every part of the territorial limits of the old Eastern District. This was specifically held in the case of *United States* v. *Hackett*, 29 Fed. 848, which is cited and approved in *Lewis* v. *United States*, 14 Fed. (2nd Series) 369, wherein the Circuit Court for the Northern District of California said:

> "The result is that the District Court for the District of Cailfornia and the Circuit Court for the District of California may continue to sit and summon jurors from the whole district for the purpose of trying those offenders."

The identity of the old Eastern District and the court thereof could easily have been preserved in all of the proceedings in this case by designating the court and the district as "The United States District Court for the Eastern District of Oklahoma as it existed immediately prior to the

passage of the Act of February 16, 1925," and all process issued out of that court could have been served by the marshal of the old Eastern District in any part of that district, including the ten counties which are not now within the territorial limits of the new Eastern District. Every safeguard of the constitution and the statutes would have been preserved for the petitioners and the Government would not have been inconvenienced or hampered in the least in the prosecution, and both the letter and the spirit of the law would have been respected and fulfilled. As it is, the petitioners have been indicted and tried in the court for the new Eastern District, which had no power or authority or jurisdiction to summon grand or petit jurors from the ten counties in the immediate vicinity of the place where the offenses are alleged to have been committed. They were tried at Ardmore, Oklahoma, in the extreme southern part of the state before a jury drawn, impaneled and selected from the immediate vicinity of Ardmore, some two hundred miles from the place where the offenses were committed.

This court, in *Gut* v. *The State of Minnesota*, 76 U. S. 35, 19 L. ed. 573, in construing a provision of the Constitution of Minnesota which is in the identical language of the Sixth Amendment except that the word "county" is used therein instead of the word "state," said:

> "Undoubtedly, the provision securing to the accused a public trial within the county or district in which the offense is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district at a distance from friends, among strangers and perhaps parties animated by prejudices of a personal or partisan character."

In this connection, we call the court's attention to the fact that in the verified motion to quash the indictment (R. 83), and in the verified motion to quash the petit jury panel from which the jury was selected to try the petitioners at Ardmore (R. 131), it is alleged that during the last three years preceding, there had been many bank failures, both state and national, in the territorial jurisdiction of the new Eastern District and that a great number of citizens therein had sustained losses either as stockholders or depositors and that because of said bank failures and said losses, there existed in the minds and consciences of many citizens in the counties from which the jury was drawn, a bias and prejudice against officers of banks and other individuals charged with the violation of the banking laws and that the petitioners believed and charged that many of the citizens whose names were in the jury box at the time said grand and petit juries were drawn, had sustained financial losses, either as depositors or stockholders in national or state banks, and that by reason thereof, were biased and prejudiced against any person charged with violation of the national banking law. *These facts were admitted by the Government's demurrer to the motion to quash the petit jury panel, which the court sustained* (R. 131, 134, 135); and we also call the court's attention in this connection to the fact that the *voir dire* examination of the jurors called for service in this case shows that this condition existed and that the petitioners were forced to exercise all of their peremptory challenges to relieve the jury of jurors whose minds were tinged and colored adversely to the petitioners because of these conditions and that the petition-

ers were even then left with certain members of the trial jury who were laboring under the unfavorable influence of these conditions (R. 140 to 210).

It was the possibility, yea, the probability, of such things being done that caused Patrick Henry to say in his speech before the Virginia Convention on the adoption of the Federal Constitution on June 14, 1788, referring to the Constitution before the first ten amendments thereto had been adopted, that:

> "That paper tells you that the trial of crimes shall be by jury and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty; a person accused may be carried from one extremity of the state to another and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the act, but, by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men? How different is this from the immemorial practice of your British ancestors and your own! I need not tell you that, by the common law, a number of hundreders were required on a jury and that afterwards, it was sufficient if the jury came from the same country. With less than this the people of England have never been satisfied. This paper ought to have declared the common law in force."

It was this objection on the part of Henry and others to section 2 of article 3 of the Constitution which caused the submission and adoption of the Sixth Amendment.

If, under section 59 of the Judicial Code and section 5 of the Act of Congress of February 16, 1925, the old East-

ern District and the court thereof is not preserved as they existed at the time of the commission of the offenses charged, then it would seem that jurisdiction to indict and try the petitioners is vested in the court of the Northern District under section 24 of the Judicial Code as held in *Quinlan* v. *United States*, 22 Fed. (2nd Ser.) 95, in which a petition for writ of *certiorari* was denied by this court on March 5, 1928. The *Quinlan* case construes the Sixth Amendment and section 59 of the Judicial Code on a state of facts identical with those in the instant case. In that case, the accused was indicted in the court for the Middle District of Georgia for an offense committed in Bibb County, Georgia, before the Middle District was created. Prior to May 28, 1926, the State of Georgia was divided into two federal judicial districts known as the Northern and Southern Districts of Georgia. Bibb County was then in the Southern District. On May 28, 1926, Congress divided the state into three new judicial districts, known as the Northern, Middle and Southern Districts. Under this act, Bibb County is in the Middle District.

The offenses charged in the indictment were committed in Bibb County in the early part of the year 1925, at a time when Bibb County was in the Southern District and the indictment was found and returned on the 4th day of April, 1927, in the court for the Middle District, in which Bibb County was at that time located. The Circuit Court of Appeals for the Fifth Circuit in that case held that section 59 of the Judicial Code preserved the old districts in Georgia and the courts thereof for the trial of past offenses in which indictments had been found and returned in the old courts

before the Act of May 28, 1926, was passed, but did not preserve them for the indictment and trial of past offenses in which no indictments had been returned prior to the passage of the act, and based its ruling on the decision of this court in *Salinger* v. *Loisel*, 265 U. S. 224, 68 L. ed. 989, and the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Biggerstaff* v. *United States*, 260 Fed. 926.

The language used in section 5 of the Act of February 16, 1925, preserving the old districts in Oklahoma and the courts thereof, is the same as the language contained in section 59 of the Judicial Code preserving generally to the old districts and their courts, jurisdiction to commence and proceed with prosecutions of crimes committed before the change in the districts. In the Act of February 16, 1925, the language used is: "to commence and proceed with the prosecution of crimes and offenses committed" and in section 59 of the Judicial Code, the language used is: "prosecutions for crimes and offenses shall be commenced and proceeded with." In construing the language used in section 59 of the Judicial Code, the Circuit Court of Appeals for the Fifth Circuit in the *Quinlan* case, said:

> "It appears from the language of that section that, so far as it deals with the situation created by the establishment of a new district, the purpose was to make provision for such criminal and civil cases as, after the creation of the new district, properly could be begun in the District Court for that district. The provision as to civil cases, except as to the manner of transfer, is contained in the second sentence of the section. The language of that sentence unequivocally

shows that the only cases it deals with in the event of the creation of a new district are civil actions pending at the time of the creation of such district. The language of the first sentence, so far as it deals with the matter of creating a new district, is consistent with it referring only to criminal cases pending when such district is created. The word 'prosecution' properly may be used to describe the proceedings after the indictment is found and returned. The connection in which the plural of that word is used in the first sentence of the section under consideration indicates that what was referred to was criminal cases pending at the time of the creation of the new district and then susceptible of being transferred. It has been authoritatively determined that the word 'prosecutions,' as used in section 53 of the Judicial Code (28 U.S.C.A., Par. 114) has the above indicated meaning. *Salinger* v. *Loisel*, 265 U. S. 224, 44 S. Ct. 519, 68 L. ed. 989; *Biggerstaff* v. *United States*, (C. C. A.) 260 F. 926.

"The provision of section 59, as to the transfer of 'such prosecutions and actions' contained in its third sentence, indicates that the criminal cases referred to are those pending when the new district is created, with the result that the file of papers therein and all documents pertaining thereto are, at the time of the creation of the new district, outside thereof and susceptible of being transferred thereto. The enactment of some such provision as the above set out one as to criminal cases was necessary or appropriate as to cases pending when a new district is created, and was unnecessary as to cases thereafter brought. To say the least, it would be questionable whether, in the absence of a statute so providing, a court other than that for the new district would have or retain jurisdiction as to crimes committed in territory included in the new district. The provision was appropriate to

enable such other court to proceed with cases pending in it when the new district was created, and which could not thereafter properly be begun in that court.

"As to criminal cases begun in the District Court for the Middle District of Georgia, the power of that court within the territory of that district was conferred by the provision: 'The District Courts shall have original jurisdiction as follows: * * * *Second.* Of all crimes and offenses cognizable under the authority of the United States.' Judicial Code, Chap. 24, Par. 2 (28 U.S.C.A., Chap. 41 (2)). That power is not restricted to crimes and offenses committed within the territory of the district after it was created. So far as section 59 of the Judicial Code is pertinent in the instant case, it provides as follows: 'Wherever any new district * * * has been or shall be established, * * * prosecutions for crimes and offenses committed within such district * * * shall be commenced and proceeded with the same as if such new district * * * had not been created, * * * unless the court, upon the application of the defendant, shall order the cause to be removed to the new district * * * for trial.'

"The provision for prosecutions being 'commenced and proceeded with the same as if such new district * * * had not been created, * * * unless,' etc., is similar to the provision of section 300 of the Judicial Code (28 U.S.C.A., Chap. 443; Comp. St., Chap. 1277): 'All offenses committed, and all penalties, forfeitures, or liabilties incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this act, may be prosecuted and punished, or sued for and recovered, in the District Courts, in the same manner and with the same effect as if this act had not been passed.' That Code (section 289 (Comp. St., Chap. 1266)), abolished the Circuit Courts and conferred their jurisdiction on the District Courts. Sec-

tion 300 referred both to cases brought in the Circuit Courts and cases not begun therein of which those courts had had exclusive jurisdiction. An effect of that provision was to enable the District Courts to proceed with cases pending in the Circuit Courts when the latter were abolished. As to criminal cases pending in the Circuit Courts when they were abolished, or of which those courts had exclusive jurisdiction, the provision of section 300 means that such cases may be dealt with by the District Courts as the Circuit Courts could have dealt with them if those courts had remained in existence and retained their jurisdiction. Section 59 makes provision for criminal cases based on alleged crimes committed in territory detached from the district of the court in which those cases were brought. Section 300 makes provision for cases brought in abolished courts and for cases of which those courts had had exclusive jurisdiction.

"Considering the situations dealt with, it seems clear that in each instance, the requirement that the cases referred to be proceeded with as if the change effected by statute had not occurred was intended to foreclose the questions as to those cases remaining subject to be proceeded with, notwithstanding such change, and as to the court or courts in which they could be carried on to judgment. That the provision of section 59 as to prosecutions being begun and proceeded with as if the new district had not been created meant merely that jurisdiction of those cases was to be retained by the court in which they were begun, and not that the disposition to be made of those cases was to be entirely unaffected by the creation of the new district, is quite manifest, as that section itself provides for the transfer of such cases to the court for the new district, which, of course, could not have been done if that district had not been created. As section 59 deals

with the situation created by transferring part of territory of an existing district to a newly created one, it well may be inferred that the language of the first sentence of that section, similar to that used in section 300, means that, as to criminal cases pending in the court of the old district when the new district is created, based on charges of crimes committed in the transferred territory, those cases may be proceeded with in the court in which they were instituted, the same as if the new district had not been created, though the places where the charged crimes were committed are no longer within the territorial jurisdiction of that court.

"An effect of the provision is to enable the court for the old district to retain jurisdiction of pending criminal cases which properly could not be begun in that court after the creation of the new district. We conclude that that provision does not refer to cases not begun until after a new district was created, and is without effect on the power or jurisdiction of the District Court of the Middle District of Georgia with respect to criminal cases begun therein, whether the crimes charged in those cases were committed before or after the creation of that district."

It necessarily follows, therefore, that if the doctrine in the *Quinlan* case is followed in the instant case, jurisdiction to indict and try the petitioners for the offenses charged rests exclusively in the court for the Northern District of Oklahoma. The *Quinlan* case, however, is in irreconcilable conflict with the instant case and also the case of *Lewis, et al.*, v. *United States*, (C. C. A., 8th Circuit) 14 Fed. (2nd) 369.

Only recently, the United States District Court for the Northern District of Oklahoma, following the decision

of the Circuit Court of Appeals of the Eighth Circuit in the *Lewis* case, discharged, on writ of *habeas corpus*, an accused who had been indicted in the Middle District of Georgia for an offense committed in the Southern District of Georgia before the creation of the Middle District. *Mizell* v. *Beard, U. S. Marshal*, 25 Fed. (2nd Series) 324. Mizell had been arrested in the Northern District of Oklahoma and the Government was seeking to remove him to the Middle District of Georgia for trial. The *Quinlan* case was relied upon by the Government as authority for denial of the writ of *habeas corpus*, but the court refused to follow the authority of the *Quinlan* case, but held that it was bound by the decision of the Circuit Court of Appeals of the Eighth Circuit in the *Lewis* case, which was in conflict with the *Quinlan* case. These conflicting decisions of the courts of two circuits bring about a situation where an accused indicted in a district in a way which the Circuit Court of Appeals in which said district is situated holds is valid and legal, is released under *habeas corpus* because the Circuit Court of Appeals of the circuit in which the writ is heard holds that the indictment is illegal and void. This is a situtation that calls for clarification and final determination by this court.

If the doctrine of *United States* v. *Hackett*, 29 Fed. 848, and *United States* v. *Benson*, 31 Fed. 896, is followed, jurisdiction rests in the court of the old Eastern District, with full power and authority to summon grand and petit jurors from any part of that district that the court might direct.

Section 277 of the Judicial Code provides:

> "Jurors shall be returned from such parts of the district from time to time as the court shall direct so as to be most favorable to an impartial trial and so as not to incur any unnecessary expense or unduly burden the citizens of any part of the district with such service."

It has been held by this court that this provision is constitutional and not in conflict with the Sixth Amendment to the Constitution, *Ruthenburg* v. *United States*, 245 U. S. 280, 62 L. ed. 414, and that the constitutional amendment does not give an accused the right to be tried by a jury representing every locality of the district, but secures to him only the right to a trial by a jury, every member of which is a resident of the territory which comprised the district at the time the offense is alleged to have been committed. *United States* v. *Peuschel*, 116 Fed. 642. *These decisions, however, presuppose that the court in which the prosecution is had has jurisdiction to summon jurors, both grand and petit, from any part of the district.* If it does not have the jurisdiction to do so, it is not the court or district as the same existed at the time the offense was committed.

It was held in *United States* v. *Standard Oil Company*, 170 Fed. 988, that the power of the federal court to direct the selection of a jury under this section should only be exercised when there is reason for it and in *May* v. *United States*, 199 Fed. 53, in which *certiorari* was denied by this court, 229 U. S. 617, 57 L. ed. 1353, it will be presumed in the absence of an order to the contrary that the court has determined that the drawing of jurors from the whole district, is most favorable to an impartial trial.

In the instant case, there was no order of the court directing the drawing of the grand jury that indicted the petitioners or the petit jury that convicted them, from any particular part of the district, although both the grand and the petit jury were in fact drawn exclusively from the territory embraced in the new Eastern District, due to the fact that both the grand and petit juries were drawn from a jury box prepared and provided for the new Eastern District, from which had been excluded all names of persons from the ten counties of the old Eastern District which are now included in the Northern District.

After the organization of the court for the Northern District, the clerk and jury commissioner, in order to prepare and constitute a jury box for the new Eastern District, withdrew from the jury box of the old Eastern District all of the names of the jurors residing in the ten counties of the old Eastern District which, under the Act of February 16, 1925, became a part of the Northern District. This was done without any order of court entered of record, although the Government contends in its brief in the Circuit Court of Appeals (unsupported by the record), that Judge WILLIAMS *verbally* directed the clerk and jury commissioner to do this. If this were true, it could not have the effect of an order of court. An order of court must be entered of record to be valid and all orders not entered of record are extrajudicial and void. 15 Corpus Juris 971; *Charleston Trust Company* v. *Todd*, (West Virginia) 131 S. E. 638; *Medlan* v. *Platte County*, 8 Mo. 235, 40 Am. Dec. 135; *State* v. *Marrionneaux*, 45 So. 389.

Under the SANBORN division order, ratified and approved by Congress in section 5 of the Act of February 16, 1925, the hearing on the motions and demurrers and trial of the case could not be held elsewhere than at Tulsa in the second division of the old Eastern District. *Case* v. *United States*, 14 Fed. (2nd Series) 510. Judge KENNAMER ruled on the motion to quash and dismiss the indictment and the demurrer to the indictment at Muskogee, Oklahoma, outside of the second division of the old Eastern District and the case was tried at Ardmore, Oklahoma, some two hundred miles distant from Tulsa, where the division order jurisdictionally fixed the place of trial, and the Circuit Court of Appeals in this case has approved this procedure by its affirmance of the case.

The Circuit Court of Appeals has held in effect, by its affirmance of this case, that because the petitioners did not move to transfer to the Northern District, they can be indicted and tried over their timely objection in the court of the new Eastern District, which does not have jurisdiction over, or power to summon grand or petit jurors from, the county and vicinity in which the offenses were committed; that by failing to move to transfer from the court of the new Eastern District to the court of the Northern District, petitioners waived their right to insist upon indictment and trial in the court of the old Eastern District and thereby conferred by consent upon the court of the new Eastern District jurisdiction to *indict* and *try* them, although that court did not have jurisdiction under any Act of Congress and could not be invested with such jurisdiction in the face of the Sixth Amendment to the Constitution. *Consent can-*

not give jurisdiction to the courts of the United States. Railway Company v. *Ramsey*, 22 Walling 322-327, 22 L. ed. 823-824; *Exporters* v. *Butterworth-Judson Company*, 258 U. S. 365, 66 L. ed. 663; *Graves* v. *Corbin*, 132 U. S. 571, 33 L. ed. 462; *Wick* v. *United States*, 290 Fed. 191 (Eighth Circuit).

A court cannot function outside of its territorial jurisdiction, *Rosencrans* v. *United States*, 165 U. S. 257, 41 L. ed. 708, and the court of the new Eastern District cannot sit at Tulsa, which is outside of the territorial limits of said district, yet, if the Act of February 16, 1925, had not been passed, the court of the old Eastern District could sit at Tulsa, where the division order of Judge SANBORN jurisdictionally fixed the place of trial of offenses committed in Tulsa County.

The grand jury is inseparably connected with, and a part of, the court in which it functions and its jurisdiction is co-extensive with, and limited by, that of the court in which it is impaneled and for which it is to make inquiry. 28 Corpus Juris, section 88, page 797; *Logan* v. *United States*, 144 U. S. 263, 36 L. ed. 429; *United States* v. *Hill*, 26 Fed. Cases 315, Case No. 15364.

A grand jury is a local tribunal and cannot inquire into offenses committed outside of its jurisdiction. In the case at bar, the grand jury that returned the indictment was impaneled in, and for, the court of the new Eastern District of Oklahoma on June 22, 1925, several months after the passage of the Act of February 16, 1925, took effect, and after the court for the Northern District had been or-

ganized on April 1st, 1925. At the same time it returned an indictment in this case, it returned other indictments for offenses committed in the new Eastern District since its creation, and it is conceded by the Government to have been a grand jury impaneled in and for the new Eastern District as it now exists.

We, therefore, submit that the only theory upon which the Sixth Amendment, section 59 of the Judicial Code and the Act of February 16, 1925, can be harmonized is to hold that the new Eastern District is not the same as the old Eastern District, but has a separate and distinct identity. That the court for the new Eastern District is not the same as the court of the old Eastern District, but has a separate and distinct identity and existence, without the same jurisdiction, without the same judges and without the limitations and restrictions of the division order of Judge Sanborn which was approved and confirmed by Congress as to offenses committed before February 16, 1925; that the court of the old Eastern District and the old Eastern District itself, are preserved and their jurisdiction reserved for the indictment and trial of offenses committed before the passage of the Act of February 16, 1925. That the court for the old district may, and should, continue to sit and exercise its jurisdiction as to past offenses at such places as the old law provided and with full power and complete jurisdiction under the old law, over the territory where these offenses were committed, and with full power and jurisdiction to try the petitioners at Tulsa in the second division of the old Eastern District and with full power and jurisdiction to summon both grand and petit jurors

from any part of the old Eastern District that the court might determine would be most favorable to an impartial trial without incurring any unnecessary expense or unduly burdening the citizens of that part of the district with such service, It would be a paradox to say that under section 277 of the Judicial Code, the court may order the jury drawn from any part of the district and then in the same breath say that the court has no jurisdiction or power to summon jurors from a certain part of that district. Yet, that is the effect of the affirmance of this case by the Circuit Court of Appeals.

Point B.

The first thirty-seven counts of the indictment fail to charge any offenses against the petitioners because the false entries charged are not items of account or made in a book of account of the bank.

The sufficiency of these counts was raised by demurrer, motion for directed verdict at the close of the Government's evidence in chief, and motion for directed verdict at the close of all of the evidence and by motion in arrest of judgment.

"Entry" as used in section 5209 of the Revised Statutes means an item of account and the word "book" as used therein means a book of account. *United States* v. *Crecelius*, 34 Fed. 30; *United States* v. *Morse*, 161 Fed. 429; *United States* v. *Herrig*, 204 Fed. 124. The pertinent part of section 5209 as same now appears is:

"Who makes any false entry in any book, report

or statement of such Federal Reserve Bank or member bank with intent," etc.

Prior to the passage of the Federal Reserve Act this statute had previously existed since 1864 in the following language on this point:

> "Who makes any false entry in any book, report or statement of the association with intent, etc."

There has been no change since 1864 in the language of the statute, "any false entry in any book, report or statement." The only change made by the Federal Reserve Act was to substitute the words "such federal reserve bank or member bank" for the words "the association."

There is no case except the instant one reported in any of the federal reports where anybody was ever prosecuted for making false entries in a minute book of a national bank. This shows a settled construction by the Executive and Judicial Departments of the Government since 1864 that this statute does not cover the making of false minutes in the minute books of a bank.

The comptroller of the currency has compiled and issued a digest of decisions relating to national banks (Public Document No. 2890), which is very exhaustive. It is printed at the Government printing office and distributed free by the Treasury Department and is used extensively by national banks. It was compiled in 1912, and contains an appendix bringing it down to 1920. This book bears the stamp of approval by the Government and by various departments charged with the supervision and administration of the national banking laws and which co-operate with

the Department of Justice in the prosecution of offenses committed thereunder.

On page 428 of this book, the *Morse* case is quoted to the effect that (and in the following language):

> "The word 'entry' as used in Revised Statutes, section 5209, declaring that every officer, clerk or agent of a national banking association who makes any false entry in any of the banks books with intent to injure or defraud the association shall be guilty of a misdemeanor, means an 'item in an account'."

And on page 781, the *Herrig* case is cited to the effect that (and in the following language):

> "The term 'false entries' as used in Revised Statutes, section 5209 (U. S. Comp. St. 1901, p. 3497), making it an offense for an officer of a national banking association to make false entries in reports to the Comptroller of the Currency, means untrue statements of items of account by written words, figures or marks made therein, and was not satisfied by a mere unfilled blank in such report, *viz.*, 'Notes and bills rediscounted, * * *' when in fact the bank had rediscounted $5,000.00 worth of its paper."

This contemporaneous and settled construction for such a long period of time by the departments of the Government charged with the administration and enforcement of the national banking laws, carries great weight with the court in construing section 5209 of the statute with reference to the meaning of the word "entry" and the word "book" therein contained. *United States* v. *Philbrick*, 120 U. S. 52, 30 L. ed. 559; *United States* v. *Hill*, 120 U. S. 169, 30 L. ed. 627; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L.

ed. 363; *Brown* v. *United States*, 113 U. S. 568, 28 L. ed. 1079; *First National Bank of Anamoose* v. *United States*, 206 Fed. 374; *Baltzell* v. *Mitchell*, 3 Fed. (2nd Ser.) 428.

While the cases of *United States* v. *Crecilius; United States* v. *Herrig*, and *United States* v. *Morse*, *supra*, did not construe the making of false entries in the minute book of a bank, they did construe the meaning of the word "entry" and the word "book" as used in section 5209, where the charge was the making of false entries in an account book of a bank.

Judge HOUGH said, in the *Morse* case:

> "I think 'entry' is used in the statute in its simple and obvious meaning, *viz.*, 'an item in an account'."

Judge THAYER said, in the *Crecilius* case:

> "In section 5209 the word 'entry' is used with reference to books of account, reports and statements. * * * If attention is paid to the purpose which underlies the law under which the indictment is framed, there is ample ground to base an inference that the construction above given is in accordance with the legislative intent. The statute was obviously enacted to prevent bank officials and employees from concealing the actual financial condition of national banking associations by means of a falsification of any of the books of account or statements or reports which they are by law required to make."

Judge BOURQUIN, in the *Herrig* case, said:

> "The statute prohibits making false entries. Neither false reports nor false verifications are within the statute. False entries in reports are untrue statements

of items of account, by written words, figures or marks made therein."

No one in the Department of the Treasury and no one in the Department of Justice and no district attorney in any of the many District Courts of the United States ever conceived the idea at any time since 1864 down to the indictment in this case that section 5209 covered the making of false minutes of directors' meetings, or stockholders' meetings of national banks. It remained to the special assistant attorney general assigned to the prosecution of the petitioners in this case to assert that such acts constituted a violation of section 5209. Such an interpretation did not occur to Judge THAYER in *United States* v. *Crecilius*, or Judge HOUGH in *United States* v. *Morse*, or Judge BOURQUIN in *United States* v. *Herrig*.

Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States* v. *Brewer*, 139 U. S. 278, 35 L. ed. 190; *First National Bank of Anamoose* v. *United States*, 206 Fed. 374; *United States* v. *Herrig*, 204 Fed. 124.

Judge BLATCHFORD said in the *Brewer* case:

> "Laws which create a crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States* v. *Sharp*, Pet. C. C., 118. Before a man can be punished, his case must be plainly and unmistakably within the statute."

Point C.

The evidence is wholly insufficient to sustain a conviction of the petitioners under the last three counts of the indictment.

The entries in the reports to the comptroller of the currency were made by certain employees of the bank, without any direction to do so by the petitioners, or either of them. It was the contention of the Government that the petitioners misapplied certain funds of the bank which resulted, in the usual course of bookkeeping, in subordinate employees of the bank innocently making the false entries in the reports to the comptroller of the currency and that the petitioners, though making the misapplication of the funds, caused the making of the false entries in the reports to the comptroller by the other employees.

It is a well settled rule of criminal law in the federal courts that evidence of facts as consistent with innocence as with guilt is insufficient to sustain a conviction and unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused. *Isbell* v. *United States*, 227 Fed. 788; *Sullivan* v. *United States*, 283 Fed. 865; *Wilkman* v. *United States*, 286 Fed. 852; *Nosowitz* v. *United States*, 282 Fed. 575. It is also true that the mere concealment by the accused from the persons making the entry of the facts necessary to enable the latter to make the correct entry, does not constitute the making of false entries by the accused and that the direction to make the false entry must include some

affirmative act to that effect on the part of the accused. *United States* v. *McClarty*, 191 Fed. 523; *United States* v. *Herrig*, 204 Fed. 124.

It must be remembered that the offense denounced by section 5209 is the making of any false *entry* in any book, statement or report of the bank with intent, etc. The making of a false report to the comptroller of the currency or the making of a false book or statement is not an offense under this section, nor is the false attestation or verification of the report to the comptroller an offense under this section. *Cochran* v. *United States*, 157 U. S. 286, 39 L. ed. 704; *United States* v. *Herrig*, 204 Fed. 124.

It has been settled by this court in *Coffin* v. *United States*, 156 U. S. 432, 39 L. ed. 481, that the making of a false entry is a concrete offense which is not committed when the transaction entered actually took place and so entered exactly as it occurred; that the entry exactly as it occurred of a transaction amounting to a wilfull misapplication, is not a false entry. This doctrine is supported by the following cases: *Cooper* v. *United States*, 13 Fed. (2nd Series) 16; *Twining* v. *United States*, 141 Fed. 41; *United States* v. *Young*, 128 Fed. 111; *Dow* v. *United States*, 82 Fed. 910; *Hyde* v. *United States*, 15 Fed. (2d) 816.

The record shows conclusively that all the entries in the reports to the comptroller of the currency were made by an unidentified stenographer on the direction of C. G. Garrett, who was a vice-president of the bank. It is not contended by the Government that either of the petitioners themselves made any of the entries charged.

The only witnesses as to the alleged false entries in reports to the comptroller were R. C. Lamprich, the cashier; C. G. Garrett, the vice-president, and the petitioner, W. L. Lewis. Mr. Lamprich testified that whenever a call for a report came in from the comptroller he would go to the books of the bank and make up a statement to be published in the newspapers, and Mr. Garrett went to the books of the bank and from them prepared the official report to the comptroller; that the books of the bank contained all of the information necessary to make out the reports as to the total loans and discounts; that neither he nor Mr. Garrett had to go to anybody or anywhere other than the books of the bank to get this information, and that the total of loans and discounts shown in the three reports charged on in the last three counts in the indictment were true and correct, as shown by the books of the bank on the dates shown therein; that in each instance the entry as to loans and discounts was obtained from the books of the bank and was true and correct (R. 298, 299, 372, 378, 379, 592 593).

Mr. Garrett testified that when a call for a report came in from the comptroller he went to the books of the bank and from them made out a report in pencil; that he got all of the information that went into the reports as to loans and discounts from the books of the bank; that he made out in this way the three reports charged on in the last three counts in the indictment; that he would turn over the pencil copy to a stenographer in the bank, who would make out the reports on a typewriter in their final form for transmission to the comptroller; that the total of loans and discounts shown in each of the three reports to the comptroller

included a note of R. A. Koons of $29,500.00, dated September 22, 1922; a note of A. M. Ballard for $21,750.00, dated December 29, 1922, and a note of Mason Kittess for $15,000.00 less the payments endorsed on the back thereof as of the date of the call; that each one of these reports was in exact conformity to the books of the bank as to the item of loans and discounts; that all of the books of the bank were in harmony in these items (R. 378-379).

The petitioner, W. L. Lewis, testified that he did not make any of the entries charged in the reports to the comptroller and did not direct anybody else to make any of them, and, in fact, had nothing whatever to do with the making of the entries therein; that the books of the bank furnished all the information necessary in making out these reports as to the loans and discounts, and that the employee of the bank who actually made out the reports charged on, got all of the information as to loans and discounts from the books of the bank and that they were made out and sent in to the comptroller without any instructions or directions from either of the petitioners (R. 392-393).

Neither Mr. Lamprich nor Mr. Garrett testified that the petitioners, or either of them, made the entries charged, or directed in any way whatsoever that they be so made. It appears conclusively, therefore, that neither of the petitioners actually made the entries or actually directed anybody to make them. But the Government contends that the petitioners caused the making of these entries as to loans and discounts because they received and appropriated to their own use the dividends on the Koons and Ballard stocks, and concealed from the cashier and bookkeeper of

the bank the fact that these payments had been made to apply on the Koons and Ballard notes, and that no entries were made on the books of the bank showing the receipt of these items, or these credits, thereby resulting in course of time in Mr. Garrett innocently making the false entries as to loans and discounts in the reports to the comptroller, in that Mr. Garrett made up the reports from the books of the bank, which were wrong, because no entries had been made showing the payment to the bank of the dividends and their application on the Koons and Ballard notes, and because the petitioners permitted the Kittess note of $15,000.00 to go up on the books of the bank as a discount, when as a matter of fact, it had been made and delivered to the petitioner, W. L. Lewis, as collateral security for the Mitchell note of $13,600.00, and that the concealment from the cashier and the bookkeepers of the bank of the information that the Kittess note was put up as collateral to the Mitchell note and not as an original discount, caused the bookkeepers of the bank to innocently enter the Kittess note on the books as a discount, and thereby in time causing Mr. Garrett in making out the reports to the comptroller from the books of the bank, to make a false entry therein as to loans and discounts by including the Kittess note in the total loans and discounts as taken from the books of the bank. Even though the facts upon which this contention of the Government was based were true, the defendants would not be guilty of making the false entries in the reports to the comptroller. The causation is too indirect, inferential and remote to bring the case within the statute.

Conclusion.

It is unquestionable that the decision of the Circuit Court of Appeals in this case is in irreconcilable conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Quinlan* v. *United States* and that confusion from this conflict has arisen resulting disastrously to the Government in some instances and disastrously to the accused in other instances. This is a situation calling for a decision of this court construing the Sixth Amendment to the Constitution and section 59 of the Judicial Code, which will be binding upon all the inferior federal courts.

We submit that under the statutes and authorities cited, the true and correct construction, and the only one permissible under the language of the constitution and statutes, in the light of the reasons giving rise to them, is that the old districts are preserved and the courts reserved jurisdiction to indict and try for offenses and crimes committed prior to the change or changes made; that the old courts have full power and jurisdiction over every part of the district as it existed at the time the offense was committed and may sit at the times and places provided under the old law in force at the time the offense was committed and may indict and try accused persons as though the changes had not been made; that in the instant case, the petitioners can be indicted only in the court of the old Eastern District and can be tried only at Tulsa in the second division of the old Eastern District in the court of that division. That the court of the new Eastern District of Oklahoma has

no jurisdiction to indict or try the petitioners for the offenses charged; that if it is held that the old Eastern District and the courts thereof, are not preserved for the indictment and trial of petitioners in this case because the indictment was not returned at the time of the change, then the only court that has jurisdiction is the court of the Northern District of Oklahoma; that under no circumstances can it be held that the court of the new Eastern District of Oklahoma has jurisdiction to indict or try.

We submit further that this court should construe the meaning of the words "entry" and "book," as used in section 5209 of the Revised Statutes, and finally settle that the word "entry" means an "item of account" and the word "book" means a "book of account" as held in *United States* v. *Crecilius; United States* v. *Herrig*, and *United States* v. *Morse*, and further that the making of a false entry in a report to the comptroller of the currency is a concrete offense under section 5209 and is not committed by the wilfull misapplication of the funds of a bank, where the entry reports the transaction exactly as it occurred, as held by this court in *Coffin* v. *United States* and *Cochran* v. *United States*, herein cited, and that the evidence in this case is wholly insufficient to sustain the conviction of the petitioners on the last three counts of the indictment.

The petitioners have been indicted and convicted in a court and district that had not been created at the time the offenses charged were committed, and which did not have jurisdiction over the place where the offenses were committed at the time of their commission, at the time of the in-

dictment or at the time of the trial, and have been subjected to severe penalties contrary to the spirit and letter of the law.

We, therefore, submit that the judgment of the Circuit Court of Appeals of the Eighth Circuit and the judgment of the District Court for the new Eastern District of Oklahoma, should be reversed by this court.

Respectfully submitted,

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